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Supreme Court of The United States

OCTOBER TERM, 1963
NO. 38

POLAR ICE CREAM AND CREAMERY COMPANY,
Appellant,

versus

CHARLES O. ANDREWS, JR., Chairman, ALEX SHAW, JACKSON LOGAN, ROBERT G. CARTER, MRS. CHARLOTTE TOMLINSON, JOHN H. CONE and DR. JAMES ACREE, as and constituting the FLORIDA MILK COMMISSION and FLORIDA MILK COMMISSION, an instrumentality of the State of Florida.

Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Tallahassee Division.

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

QUESTION ONE

IS CHAPTER 501, FLORIDA STATUTES, AND ORDERS ENTERED BY THE FLORIDA MILK COMMISSION PURSUANT THERETO UNCONSTITUTIONAL AS BEING IN VIOLATION OF ARTICLE I, SECTION 8 (COMMERCE CLAUSE) AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

QUESTION TWO

CAN THE STATE OF FLORIDA COLLECT FROM A DISTRIBUTOR OF MILK, WHOSE PLANT FACILITY IS PHYSICALLY WITHIN THE DEFINED BOUNDARIES OF FLORIDA, A TAX OR REGULATORY FEE CALCULATED UPON THE GALLONAGE OF MILK DISTRIBUTED THEREBY FOR THE PRIVILEGE OF CONTINUING IN OR ENGAGING IN THE BUSINESS OF DISTRIBUTING MILK, NOTWITHSTANDING THAT SOME OF THE GALLONAGE UPON WHICH SAID CALCULATION IS ACCOMPLISHED IS REGULARLY SOLD TO AN AGENCY OF THE UNITED STATES OF AMERICA?

STATEMENT OF THE CASE

The Appellees agree with the statement of the case as submitted by the Appellant, except as to the following particulars.

Paragraph one of part one of said statement (appearing on Page 5 of Appellant's Brief) states that:

"Testimony was taken and arguments held with reference to the following issues:
"(1) Whether Chapter 501, Florida Statutes, and the reg-

ulations and orders of Defendant, as applied to milk delivered by Plaintiff to military reservations, are constitutional."

No testimony was taken and arguments were not heard with reference to such an issue. Attorneys for Appellees and Appellant stipulated at the pretrial conference below that this issue had become moot. The Honorable Harrold Carswell, Judge of the United States District Court for the Northern District of Florida, entered an Order on February 21, 1962, discharging a temporary injunction theretofore entered involving the utilization of milk sold by Appellant on military installation "for the reason that the acts sought to be restrained *are no longer involved and the issue has become moot*" (R-75). (Emphasis supplied). At the trial below Judge Carswell stated that "we were through with military milk questions . . ." (R-96). The attorney for Appellees stated at the trial below "I believe that this clarifies the issues insofar as the military contracts are concerned." The sum of this is that the only remaining involvement with military milk relates solely to the authority of the State of Florida to collect the regulatory fee imposed on milk distributed by Plaintiff to military installations. Accordingly, the voluminous amount of testimony establishing the extent of Appellant's involvement with military sales is material only insofar as indicates the extent of the regulatory fee which would be unconstitutional should Appellant prevail on that point. It is particularly significant to note that there was, at the time of this trial below, NO ORDER, NO REGULATION, NO ATTEMPTED INVOLVEMENT WITH RESPECT TO THE ACQUISITION OF MILK TO BE SOLD BY APPELLANT TO MILITARY INSTALLATIONS. In short, this aspect of Appellant's business was exclusively one of uncontrolled negotiation and contract. (R-149)

Appellees do not quarrel with that part of the statement of the case entitled "2. OPINION OF THE DISTRICT COURT." Most of that aspect entitled "3. BACKGROUND"

is one of artful argument and debate rather than accurate statement of fact. For instance, on page 11 of Appellant's Brief, it is stated:

> "Conversely, it (alluding to an order of the Florida Milk Commission on classification of milk) provided that the Class II and other lower class sales of which Florida producers were formerly absorbing a fair share would be allocated to the out of state milk purchased by Polar and the other distributors."

No order of the Florida Milk Commission provides as is represented here by Appellant. They might reasonably argue that such might be the effect, but to represent such a proviso to this Court is at best a departure from fair writing. Because of this, Appellees challenge the entirety of that part of the statement of the case entitled BACKGROUND and respectfully submits the following in lieu thereof:

BACKGROUND

It may be helpful to the Court for Appellee to briefly explain the industry involved in this litigation. Florida's milk price control law, like that of other states having it, is modeled after New York's law. New York's law, in a precedent making decision, was upheld as constitutional under police power by the Supreme Court of the United States in the case of *Nebbia vs. New York, 1934, 291 U. S., 502, 54 S. Ct. 505, 78 L. Ed. 940, 89 A.L.R. 1469.* Because of that, most, if not all, of subsquent state legislation in this field was patterned after the New York act.

At the present time, legislation authorizing the control of the price of milk is in force in many states and by the Federal Government.

Florida's milk price control act is contained in Chapter 501, Florida Statutes. It is valid legislation and constitutional under the state's police power. *Miami Home vs. Milk Control Board, 124 Fla. 797, 169 So. 541. Shiver vs. Lee (1956), 89 So. 2d 318. Milk Commission vs. Dade County Dairies, 145 Fla. 579, 200 So. 83. Alderman vs. Puritan Dairy, 146 Fla. 345, 1 So. 2d 177.*

It was in *Shiver v. Lee*, supra, that the Court, in commenting on the findings of the legislature contained in Chapter 501.01, said:

> "We have never found a stronger finding of fact and statement of policy as the basis for regulating and administering a great industry than that embodied in the two paragraphs preceding this for control of the milk industry. Chapter 19231, Acts of 1939, from which Chapter 501, Acts of 1953, was in the main drawn, was a complete departure from the milk control acts, in that it recognized the necessity for control and supervision of the milk industry. One cannot read the findings of facts and statement of policy without being convinced that the paramount purpose of the legislature was to invoke the police power for protection of the public health, safety and welfare as well as the welfare of those engaged in the milk industry. Every legislature since said act was passed has amended and strengthened it and the 1955 legislature refused to repeal or modify it."

and

> "A casual reading of the legislative findings shows that the milk industry had through devious means become a sick business, that an adequate supply of fresh, wholesome milk for the public had become imperiled and that it was necessary for the protection of the public, the consumer and producer to impose rigid restrictions and price fixing. It would be difficult to point out a more convincing case for legislative intervention."

The opinion of the court below, written by District Judge Harrold Carswell, cited specifically the language hereinabove noted (R-188).

As the orders here involved are base fixing and price fixing orders of the Florida Milk Commission, some background on the pricing methods and structure adopted by the Milk Commission of Florida to comply with the legislative requirements set forth in Chapter 501, Florida Statutes, might be first appropriate. (This Court takes judicial notice of matters known to informed people—*Milk Commission vs. Dade, 145 Fla. 579, 200 So. 83*), and of Administrative Rules (*Daoud v. Matz, Fla. 1954, 73 So. 2d 51*).

While it costs the producer just as much to produce each gallon of milk, whether that milk is utilized as fluid milk for consumption or in manufacturing ice cream, cottage cheese or in any other way, the distributor's return from his sales varies according to its utilization by him. The distributor is able to sell the Class I or fluid milk for the highest price, the Class II, III and IV milk at lower prices.

So, the Florida Milk Commission, like at least some agencies in other states, has adopted utilization pricing (it is authorized to do so under Chapter 501, Florida Statutes), under which the distributor pays the producer the highest price for the Class I milk, a lower price for Class II, III and IV milk. Such utilization pricing is for the benefit of the distributor and in recognition of his utilization of milk in different ways at different returns to him. It helps also in discouraging over-production, as the producer is paid less than the cost of production for Class II, III and IV milk.

In doing so, however, the Commission, in setting the minimum prices to be paid producers for the various classes of milk, must

also comply with the requirements of Chapter 501, Florida Statutes, that the producer receive a reasonable return for his milk. The price he receives for his Class I milk is above the cost of production and is a fair return; the price he receives for his Class II, III and IV milk is below his cost of production and fair return; the average or "blend" price that he receives must be considered. In addition, there must be some formula or implementation by which the distributor can determine the amount to be paid each producer each month.

So, the Commission, in fixing prices and adopting the formula, in its base plan order provided that, in computing amounts to be paid producers the total utilization by the distributor, regardless of source, would be considered and any milk transferred or diverted would be allocated according to its final utilization, and fixed its minimum prices accordingly.

As an illustration of the mechanics involved, assume the amount to assure a producer a reasonable return in compliance with the statute has been determined to be $.5610 a gallon. Assume further the distributor receives from his local producers 100 gallons of milk and from other sources 5 gallons. Assume also the distributor diverts 15 gallons of milk, with its final utilization as Class I milk, and that the remaining total balance of 90 gallons is utilized by him as follows:

65 gallons as Class I milk
15 gallons as Class II milk
10 gallons as Class III milk
No utilization in Class IV milk

and that the price to be paid the producers is $.61 for Class I milk, $.40 for Class II milk, and $.26 for Class III milk.

Under the Commission's orders, the 15 gallons of diverted milk is counted as Class I milk in calculating amounts to be paid

the producer, and the producer would therefore be paid as follows for his 100 gallons:

80 gallons at Class I price	$48.80
15 gallons at Class II price	6.00
5 gallons at Class III price	1.30
No utilization in Class IV milk	
	$56.10

For his 100 gallons the producer receives a "blend" price of $.5610 a gallon, or the predetermined reasonable return.

But, assume the distributor, as in the case here involved, tried to pay for the diverted milk at only $.43 a gallon. The producer is then paid as follows:

15 gallons at $.43	$ 6.45
65 gallons at Class I price	39.65
15 gallons at Class II price	.6.00
5 gallons at Class III price	1.30
No utilization in Class IV milk	
	$53.45

The producer gets, for his 100 gallons, a "blend" price of only $.5345 a gallon. And the intent of the Commission's pricing structure would be circumvented and the legislative purpose thwarted.

For simplicity, the foregoing ignores butterfat price differential calculations, and other details showing calculation of producer settlements. It should also be pointed out that the producer, by over-production of milk, either at his own volition or because of encouragement by his distributor, can lower his blend price. Utilization pricing itself tends to discourage such; the Commission, through other orders not here involved, also attempts to discourage and control over-production.

SUMMARY OF ARGUMENT

I. FLORIDA MAY CLASSIFY MILK AND REQUIRE ITS NATIVE DISTRIBUTORS TO PAY ITS REGULAR BASE-EARNED PRODUCERS A REASONABLE PRICE FOR EACH OF SUCH CLASSES OF MILK.

The decision of the District Court is plainly correct. *Chapter 501, Florida Statutes,* has been upheld many times as constitutional and not in violation of the Commerce Clause, Due Process and Equal Protection of the Law under the United States Constitution.

As the supreme court of Florida stated in the leading case of *Borden Company v. Odham, 121 So. 2nd 625:*

> "These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 *Lawyers' Edition* 940 and *Shiver v. Lee, supra.*".

Needless to say, this Court has upheld legislation like Chapter 501, Florida Statutes, many times beginning with the landmark in this field of *Nebbia v. New York, 291 U. S. 50, 78 L. Ed. 940.*

As the District Court said, the Appellant relies most heavily upon the case of *Baldwin v. Seelig, 294 U. S. 511,* for the proposition that *Section 501.13 (8), Florida Statutes,* is unconstitutional as a restraint on interstate commerce. The Court clearly distinguished the Baldwin case with the case at Bar as this Honorable Court distinguished the Baldwin case with the case of *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products, 306 U. S. 346.* In

upholding the constitutionality of Pennsylvania's "milk laws", this Court made some observations in Eisenberg that are particularly appropriate to this cause and appear in our argument in chief.

Another case which is controlling in upholding the exercise of the police power here involved is *Highland Farms Dairy, Inc., v. Agnew et al, 300 U.S. 608.*

In short, the cases are legion upholding the constitutionality of such regulatory acts and the Apellant, as the District Court said, has failed to sustain the burden of proof that there has been an illegal application of Appellee's power to establish minimum producer prices upon Appellant.

II. FLORIDA IS NOT IN VIOLATION OF THE PROCUREMENT POLICY OF THE UNITED STATES OR THE DOCTRINE OF *PAUL v. UNITED STATES*, 9 L. ed. 2nd 292, IF IT ATTEMPTS NO REGULATION IN THE ACQUISITION OR SALE OF MILK TO A MILITARY INSTALLATION.

Though stated as a question involved by Appellant, and argued extensively in their Brief, there simply is no involvement in this appeal with the so-called military milk question. Prior to the trial of this cause, the Court below said this question had become moot (R-75). The crux of Appellee's position to this point is simply that the doctrine enunciated by this court in *Paul v. United States* is not applicable. There is no order, regulation or enforcement of any price to be paid by this distributor to any producers for milk going to military installations. On the other hand, there is no order, regulation or enforcement of any price at which this distributor must sell his product to the military. According to Appellant's testimony, he can buy all the milk he ever wants without seeing another Florida producer and buys approximately seventy per cent

(70%) of his product extra-territorially (R-129). The matter of acquisition of milk by this Appellant for servicing of military contracts is one of open and bilateral negotiation. There is no testimony in this record to the contrary, so the matter should not be considered as a question involved.

III. THE SANCTITY OF GOVERNMENTAL CONTRACT IS NOT VIOLATED WHEN A REGULATORY FEE DOES NOT ENVISION NOR TAX THE TRANSCACTION WITH THE UNITED STATES BUT RATHER EXACTS A REASONABLE SUM BASED UPON GROSS GALLONAGE OF BUSINESS BY A DISTRIBUTOR CALCULATED TO FINANCE THE REGULATORY FUNCTION ONLY AND NONE OF WHICH FUNDS DERIVE TO THE GENERAL REVENUE FUND OF THE STATE OF FLORIDA.

The applicable *Florida Statutes, Section 501.09(6)* exacts the identical gallonage fee from distributors and producers in Florida (see Appendix "A"). It is calculated to produce funds sufficient only for the conduct of the regulatory body. This fee specifically abates when the net sum of it exceeds 125% of the budgeted needs of such regulatory body. Such funds are deposited into a trust account none of which can ever reach the general revenue fund of the State of Florida. From the foregoing, the Court quickly sees that this fee is not a tax imposed by the State of Florida upon the Government of the United States, thus violating the Supremacy Clause, Article I, Section 8, Clause 17 of the United States Constitution.

There is not any testimony here that the fee is excessive, constitutes a tax for revenue purposes or is imposed unfairly as to this distributor as compared to those of identical standing. This court, in *Texas Company vs. Brown, 258 U. S. 466, and Baldwin v. Seelig, 294, U. S. 511*, said that such a regulatory fee

may only be attacked if it is so excessive as to constitute a tax for revenue purposes and thus imposing a burden upon interstate commerce. The Court below held this fee to be one upon the privilege of doing business in the State of Florida and not a tax upon the milk or upon the transaction with the Government of the United States. It is generally held that a state may charge a fee reasonably sufficient to meet the expenses of the inspection as an incident to its power to make valid regulatory and inspection laws and such a fee is not properly assailable as a burden on interstate commerce (*U. S. Pure Oil Company vs. State of Minnesota, 63 L. ed. 180.* Florida's regulatory fee, therefore, should be sustained and the Order of the Court below upheld.

ARGUMENT

QUESTION *ONE*

IS CHAPTER 501, FLORIDA STATUTES, AND ORDERS ENTERED BY THE FLORIDA MILK COMMISSION PURSUANT THERETO UNCONSTITUTIONAL AS BEING IN VIOLATION OF ARTICLE I, SECTION 8 (COMMERCE CLAUSE) AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

The Appellees feel constrained, in explanation for the redefinition of points here involved, to present to the Court, before embarking upon the principal argument, its bewilderment at the variance between the allegations of the Complaint, the questions presented here, and the proof at trial. Unless this procedure is foreign to all others, the issues are created and defined by the pleadings and narrowed by subsequent Orders of the Court. Appellant obtained access to this Court and its power to restrain by utilization of an array of broad general allegations of fact which create impressions of an exercise of extra

territorial jurisdiction by the Florida Milk Commission. Some of these allegations are:

> "• • • The Florida Milk Commission has at all times taken the position that the Plaintiff must buy *all its requirements of milk from Florida* producers at a price to be fixed by the Florida Milk Commission • • • Out of state milk cannot be purchased by Plaintiff, in accordance with the interpretation of the law by Defendants, until after all Florida milk, including surplus milk which *might be shipped from any place in Florida* to the Plaintiff, has been exhausted." (Paragraph 43 of Amended Complaint) Emphasis supplied.

No testimony to substantiate this allegation was even attempted. In fact, it was belied when the President testified that 70% of the milk used in his plant is purchased from outside of Florida (R-132). There was not one single question asked to produce one shred of evidence that this Appellant ever accepted or was asked by the Florida Milk Commission to accept any milk from a Florida producer other than those connected with his plant.

The other reason for our re-statement of the Questions Presented is the part the military question plays in this proceeding. Prior to the trial below, the writer of this Brief had become convinced that by stipulation and court order (R-75) we were no longer involved with it. However, much of the testimony below and the overwhelming majority of the exhibits introduced and a bulk of the Brief of Appellants here attempts to re-introduce the question of "military milk" into this cause. In addition, the attorney for Appellant in the closing moments of his argument to the Court below (R-164) romped back on this very subject which had "become moot" when he said, "and we say this, that the right to the contract is impaired by the prohibition contained in the Milk Commission Order with respect to the pricing of milk delivered at military installations,

* * *". Since the Court below continued to be intrigued, at trial, with the military question, this brief will endeavor to explain, while not conceding, that it is in any way involved with this proceeding. It is ironical that the Appellant originally came into this Court expressing a great desire to purchase distress milk throughout this nation in the fulfillment of its military contracts and contending that the military milk order of the Florida Milk Commission prohibited them from exercising this right. (Since the filing of that Complaint, the military order of the Milk Commission no longer is in existence (R-75)). In fact, THERE IS NO CONTROL WHATSOEVER UPON THE DELIVERY OF MILK TO SUCH AN INSTALLATION (except the question of the regulatory fee hereinafter argued). Since this destroyed their effort to scream prejudice, they now pose PURE CONJECTURE to the Court in an effort to inflame you. Pause here, if you will, and examine that statement. Was there any testimony in this record to the effect that this Appellant or any other distributor had ever been told that he had to pay any particular price for milk going to a military installation, or that he could not use milk from any source in the fulfillment thereof? Not one word even suggesting such a course. Now the lawyers would ask the Milk Commission *what it would do if* they elected to purchase Florida milk to go to military installations. By this process, the attorneys for Appellant artfully asked the Court to decide a question that might develop in the future. Since the Court was interested, I might reiterate that this is totally conjectural in view of the testimony of Appellant that he could buy all the milk he ever wants without ever seeing another Florida producer (R-129). So we see that the Complaint was that he wanted to be free to buy Wisconsin distress milk. After we told him he would buy it from every state in the union for $.02 a gallon so far as our regulations are concerned, then he decides to say, no, we want Florida milk and you are regulating that. *The specific point*

here is that there is no Florida regulation pertaining to the sale of milk on military installations. Since there is none, he and a Florida producer would be upon the open market of free negotiation in a determination of the price at which the Appellant would buy and the producer would sell the milk to be so utilized. It amazes me that this absence of any control could give impetus to such misunderstanding and a label of unconstitutionality against the Florida Milk Commission.

Returning to the question posed, it is suggested that the real crux of this controversy quickly becomes the so-called "base plan" adopted by the Florida Milk Commission (Appellee) without which no price order would justify the paper upon which it was written. The Florida base order, classification order and matters pertaining thereto are quoted for your convenience in the appendix.

Classes II, III and IV as defined (see Appendix B) can be considered as surplus milk for which a distributor cannot be required to pay more than the market value, in Florida, of the component parts thereof, *501.13 Florida Statutes, 1963* see Appendix A). To explain how this is accomplished to the complete fairness of distributors, you may take notice of the fact that the southeastern portion of Florida is not under the jurisdiction of the Florida Milk Commission. This area is regulated by certain Order of the United States Department of Agriculture. The Federal agency promulgated in 1957 its Order No. 188 regulating the handling of milk in this marketing area. *This Order provides uniform minimum prices to be paid producers by classes of milk.* This Federal Order utilizes a mathematic formula to be applied to the price to be paid on the Chicago market for the constituent parts of milk (a recognized market price). Since they do such a good job of this, the Milk Commission sets the prices for the Florida classifications for the monthly market findings by the Federal Order. This price, of course, fluctuates and you see, immediately,

that if there was no market for these component parts of milk, then there would be no price and the distributor would not be compelled to do anything but dump and pay nothing.

Factually, the above mentioned orders of the Appellee are propelled into significance by virtue of the contention of Appellant that the net effect thereof is to limit his acquisition of milk at the best available market. Appellant points to the testimony indicating that from time to time surplus milk in different areas of the nation can be bought at distress prices and utilized by him to his economic advantage. By this argument, Appellant, in effect, admits that he seeks a ruling, the effect of which would be to allow him to skip across the nation in pursuit of surplus milk and be required to purchase only what he wishes from his local dairy farmers. If Wisconsin happened to be in surplus for a couple of weeks he would have destroyed all of the dairy farmers attached, by the above cited order, to his distribution plant. Cows cannot be turned off when a market diminishes. They must be milked. The price order then would be as ineffective and unenforceable as if it did not exist.

The Florida Supreme Court has considered the identical question presented by this appeal in *Borden Company, a corporation, v. J. Brailey Odham, Chairman, et al, 121 So 2nd 625.* In 1957 the Florida Milk Commission established prices for three (3) different classifications of milk (now four are in effect). Subsequent to this action by the Commission the Plaintiff distributors, in the Borden case, informed their producers of a policy not to accept milk in excess of Class I requirements, and filed a complaint seeking relief against the enforcement of the price and classification orders. Of note in that case is that prior to this order the same distributors customarily accepted all of the milk produced and delivered to them, utilizing as much as possible in Class I channels and according to the producers in all milk in excess thereof upon prices determined

by the distributors to be the value of the butterfats and serum solids recovered from such excess milk. The chief contention in this *Borden Case*, supra, was that the provisions of this order would deprive them (the distributors) of their liberty of contract and of their property without due process of law in violation of section 12 of the Declaration of Rights of the Constitution of Florida and the Fourteenth Amendment to the United States Constitution (argued here by Appellant). The Court clearly and succinctly recited the statutory powers of the Milk Commission and exhaustively delineated the reasons therefor. I shall not belabor that aspect of the opinion but quickly will point to the fulcrum of the decision.

The Court, in *Borden Company v. Odham*, supra, said:

"These powers to supervise and regulate the milk business in Florida are common to those regulating the milk business in other states and have been upheld as proper exercises if not done in an arbitrary and unreasonable manner. The transportation business and other businesses are similarly regulated. *Nebbia v. New York, 291 U. S. 502, 54 S. Ct. 505, 78 Lawyers' Edition 940 and Shiver v. Lee, supra.*"

The Court went further to say, in effect, that no other way had been devised to carry out the purpose of such acts and that so long as a commission acts within reason it may require a distributor to take all of the producers milk.

Further from the *Borden case*, supra:

"We do not think the construction of the law as applied to appellants is unconstitutional. In fact we do not see that the Commerce Clause of the Federal Constitution has any proper place in the argument. We have been shown no reason why Chapter 501, Florida Statutes, F.S.A., is not well within the police power of the legislature to promulgate. The powers vested in the Commission contemplates the protection of the public, the producer and the distributor of milk. The powers of the Commission must be reasonably

exercised and there is no showing here that they have been imposed in an unreasonable or harsh manner. As to that aspect of Appellants' grievance directed to the price-fixing and other orders of the Commission, the provision for notice, hearing and an opportunity to be heard remove this objection and there is no showing that appellants suffered from these or failure to invoke them. It is accordingly our view that the Chancellor correctly held that infringement of liberty of contract as constitutionally understood, the violation of due process or the Commerce Clause, or any of them, are not shown here."

Every facet of question one presented in this appeal was considered meticulously by the Circuit Court in a thirty page written Order which was affirmed by the Supreme Court of Florida in the case of *Borden v. Odum*, et al, supra.

The major contention of Appellant is, of course, founded upon the Commerce Clause and comfort gained by the citation of *Baldwin v. Seelig, 294 U. S. 511*. In this particular case, the New York Statute was involved and a New York distributor who was purchasing milk in Vermont and transporting it into in New York in kind and, in fact, in the very cans in which it was transported in commerce. There was one principal distinction between Baldwin and the case presented to this Court, viz, the State of New York applied a law to such a transaction which said, in effect, that it is unlawful for a distributor to sell any milk purchased in another state under any circumstances in New York unless that importing distributor had paid to the producer in the other state (Vermont) the same price that the state of New York required distributors to pay New York producers. *There is no such law in question here nor any testimony that such an interpretation has ever been mentioned by the Florida Milk Commission.* There is, however, one aspect of the *Baldwin case* which is worthy of note. The Supreme

Court of the United States said here, at the outset of its decision:

> "The New York Milk Control Act with the aid of regulations made thereunder has set up a system of minimum prices to be paid by dealers to producers. *The validity of that system in its application to producers doing business in New York state has support in our decisions.*" (Emphasis supplied)

Of course, they quore the hallmark in this field, *Nebbia v. New York, 291 U. S. 50, 78 L. ed. 940.*

The next significant case which appears to be controlling upon the question here presented is *Highland Farms Dairy, Inc. v. Agnew, et al, 300 U. S. 608.* This decision dealt with several principles of law, some of which have been touched upon, though not too seriously, by the Appellant. Without belaboring these callateral issues. It is suggested to the Court that *Highland* stands for the proposition that,

(a) A milk control state statute is not unconstitutional as an unlawful delegation of legislative authority,

(b) A state milk control act is not invalid by reason of a provision establishing milk marketing areas and controlling such area independently, and

(c) The statute is not invalid for failing to prescribe the standards to be applied by state milk control board in granting a license or refusing them.

In this Highland case, the constitutionality of the Virginia Milk Control Act was in question. The Court recited the powers created by that statute which closely parallel the Florida act. Again, the Supreme Court, speaking through Mr. Justice Carddzo, who incidentally rendered the *Baldwin decision*, supra, commenced its decision by stating:

> "That the power of a state to fix minimum prices for milk in order to save producers, and with them the consuming public from price cutting so destructive as to endanger the supply, was affirmed by this court in *Nebbia vs. New York, 291 U.S. 502, 78 L. ed. 940.*

The Court made note of an aspect of the Virginia Act to the effect that none of the provisions

> "shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution. * * *."

This closely parallels *Florida Statute 501.18* Subsequent to both of the above cited decisions, the United States Supreme Court again considered the proposition presented to this Court. In *Milk Control Board of the Commonwealth of Pennsylvania vs. Eisenberg Farm Products, 306 U.S. 346,* Mr. Justice Roberts delivered the opinion of the Court. The Court said,

> "We are called upon to determine whether a local police regulation unconstitutionally regulates or burdens interstate commerce."

The Court specifically set forth all of the powers of the Milk Control Board established by the Pennsylvania legislature in 1935. This brief shall not list them all except to include the last recitation by the Court, viz:

> "The Board may vary the price *according to the production, use, form, grade or class of milk.*" (Emphasis supplied)

The Court, in upholding the validity of the Statute and its specific application in this case stated:

> "One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the

state's citizens. *Every state police statute necessarily will affect interstate commerce in some degree,* * * *." (Emphasis supplied)

The Court, in Eisenberg, made some observations that sound as if they were talking of the case at Bar when it said:

"The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York.

"If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable."

The Respondent in this case obviously relied, as does the Appellant here, upon *Baldwin v. Seelig*, supra. The Supreme Court, in dismissing that contention, said that in the *Baldwin case*,

"This Court condemned an enactment aimed solely at interstate commerce attempting to effect and regulate the price to be paid for milk in a sister state, * * *."

This is precisely the position taken by this Appellee at trial and in this brief in suggesting that Baldwin has nothing whatsoever to do with the determination of the case at Bar.

Before applying other enunciated principles of law to the questions here presented, the few gaps in the factual picture should be filled. It is important to realize that Appellant purchases milk all over the nation seasonly (R-127). The seventy percent (70%) of the total gallonage of milk used by Appellant in his distribution plant is attributable to all sales without reference to classifications of milk, for he keeps no record of classification (R-132). Appellant keeps no sales records and few, if any, accounting facts of his business are known to this Court or to anyone else. To specifically corroborate this contention reference to JUDGE WARREN JONES OF THE CIRCUIT COURT OF APPEAL BENCH, WHO HEARD THE TESTIMONY AND FORMED CONCLUSIONS BASED UPON HIS CONFRONTATION OF WITNESSES SAID:

> "UNLESS HE (speaking of Appellant) HAS A BETTER RECOLLECTION THAN HE HAD ON THE STAND, HE DIDN'T HAVE BOOKS, RECORDS, OR MEMORY, WHEN HE WAS ON THE STAND OF WHAT MILK HE GOT, WHEN, WHERE." (Emphasis supplied). (R-138)

In the negative, there is no testimony to the effect that Florida has the authority or the intention of even inferntially urging the Appellant or any other distributor in Florida to pay the producers of any other state, from which Appellant purchases any milk, any specific price for that milk. In short, the record discloses that Appellant pays, seasonly, as little as $.30 per gallon for distress milk in different parts of the country (R-127). Critical to Appellant's citation of *Baldwin v. Seelig*, supra, is this observation, for in *Baldwin*, the receiving state attempted to require the importing distributor to apply the producer prices of the receiving state to the producers extra-territorially from whom such a distributor purchased that milk.

Appellant cites with glee and apparent confidence the case of *Lehigh Valley Coop v. U.S., 370 U.S. 76 (1962)* in urging this Court to label the Florida milk regulatory act and orders adopted pursuant thereto as a trade barrier. This case actually expresses the continued support by the Supreme Court of the United States of regulations establishing minimum producer prices. Mr. Justice Harlan specifically said so in writing the opinion of the Court in this case. A critical analysis of the *Lehigh Valley* case to the one at Bar reveals that the crux of the case in Lehigh involved an Order of the Federal Administrator, the net effect of which was to require distributors of milk purchased from outside the federal milk market area involved to pay the "pool" producers of the federal milk marketing area a penalty (calculated upon a formula) for selling milk within that area. Please be mindful that under this Order under question in Lehigh, the processors or distributors were compelled to pay a price to market area producers NOT FOR MILK ACQUIRED BY THEM, NOT REPRESENTING A PURCHASE OF ANY KIND, but simply because those processors utilized milk purchased extra-territorially. There simply is no fact or factor involved in this appeal upon which the Lehigh case can be used as authority. The only support it gives Appellant is that an Order was knocked down as a trade barrier, for there is no comparable order or situation under the regulation by the State of Florida. By implication the Order was rejected by Mr. Justice Harlan, speaking for the Court, not so much because it was a trade barrier BUT BECAUSE THE COMPENSATORY ORDER ENUNCIATED BY THE FEDERAL ADMINISTRATOR EXCEEDED THE AUTHORITY OF THE CONGRESSIONAL ACT. In support of this, your attention is directed to the following quote from the opinion of the Court in the *Lehigh Valley Coop* case:

> "It is only if the secretary has been authorized by the statute to impose such economic trade barriers on the entry

> of milk into an area so as to protect the prices received by the pool producers, that the present compensatory payment plan can be sustained as 'necessary to effectuate' the expressly authorized provisions of this order."

This *Lehigh case* does not, in fact, express a repugnancy against some regulation of outside milk into a market controlled by the United States Government or by a state. If this observation is shocking to the Court after reading the Brief of Appellant, reference to this remark by Mr. Justice Harlan, for the Court, will justify it:

> "Some of the regional orders now in effect do not undertake any economic regulation of 'outside' or 'other source' milk. But it is quite obvious that under certain circumstances *some regulation of such milk may be necessary*." (Emphasis supplied)

In closing to this question, the Appellee simply suggests to the Court that the cases are legion upholding the constitutionality of such regulatory acts. We respectfully submit to the Court that there has been no testimony indicating the assumption by the Florida Milk Commission of any extra-territorial jurisdiction whatsoever. It was stipulated that this Appellant can purchase milk from every state in the union and pay whatever price his negotiations might provide. It is specifically represented to the Court that, unless he expresses a need for it, the Appellant need not participate in the acquisition of any temporarily surplus milk in any part of Florida except from the "base earned producers" connected with his plant. One specific point of interest is that Appellant has claimed hardship and oppression resulting from control by the Florida Milk Commission, AND YET HE CANDIDLY ADMITS THAT HE WAS REGULARLY PURCHASING MILK FROM THE IDENTICAL "BASE EARNED PRODUCERS" DURING THE YEARS THAT THE FLORIDA MILK COMMIS-

SION EXERCISED NO CONTROL IN THAT AREA. He further admits that he was paying $.61 per gallon for milk acquired from them (R-135). All of this was under free trade with each of them. Immediately after acquisition of control of this area by the Milk Commission, the Appellant, who now says he has been wronged, retroactively slashed prices to his producers from $.61 per gallon to $.56 per gallon to $.43 per gallon (R-136). The record simply fails to show that this Appellant has established a single fact which would support a single contention in this case.

QUESTION TWO

CAN THE STATE OF FLORIDA COLLECT FROM A DISTRIBUTOR OF MILK, WHOSE PLANT FACILITY IS PHYSICALLY WITHIN THE DEFINED BOUNDARIES OF FLORIDA, A TAX OR REGULATORY FEE CALCULATED UPON THE GALLONAGE OF MILK DISTRIBUTED THEREBY FOR THE PRIVILEGE OF CONTINUING IN OR ENGAGING IN THE BUSINESS OF DISTRIBUTING MILK, NOTWITHSTANDING THAT SOME OF THE GALLONAGE UPON WHICH SAID CALCULATION IS ACCOMPLISHED IS REGULARLY SOLD TO AN AGENCY OF THE UNITED STATES OF AMERICA?

The Appellee respectfully suggests that this question must be answered in the affirmative. Because of our re-definition of this question to confine the area presented to the Court to be one of determination of the efficacy of the regulatory fee set forth in 501.09 Florida Statutes, we are desirous of reminding the Court of out handling of the overall military question under our statement of the case called "Background". Suffice it to say, at this juncture, that there is no Statute or regulation appertaining to the acquisition or distribuion by Appellant to a military installation. Since a majority of the milk processed by

Appellant goes to military installations, and since he purchases this milk, admittedly, from all over the nation at prices ranging from $.30 per gallon up, and since the State of Florida involves itself to no degree in the price at which he sells his product to a military installation, it seems obvious that such cannot logically lead to a label of unconstitutional activity on the part of Florida. However, should the Court be impressed with the total conjecture of Appellant by propounding questions such as that posed by Mr. Harrell to his client (R-131).

"*If* he delivers Florida milk to a military base, he will have to pay $.61 per gallon for each gallon of Florida milk so delivered," I should like to respond to the conjecture so that this involvement might be totally erased from this case. Florida not only does not attempt to regulate the price Appellant sells milk to a military installation, it seems obvious that such cannot logi- for which he pays for such milk so delivered to a military installation, but instead there is simply no regulation concerning that aspect of his business. To specifically answer the question of Mr. Harrell as recited hereinabove, Florida takes the position only that if he is desirous of using Florida milk to fulfill a military contract, that he bi-laterally agrees with Florida producers for such milk. He cannot use their milk and unilaterally set the price therefor. I hasten to add, in closing this aspect of the brief that he is not, however, compelled to purchase any Florida milk for such a contract but is welcome to do so. There can be little serious question of the right of a state to impose a fee upon native industry, the amount of which is reasonably calculated to support the inspection and regulation of that industry. The question presented by Appellant is whether or not this fee is a reasonable one and whether or not, in its enforcement, it becomes a burden upon milk transported across the state line and processed in Florida by Appellant. To the question of reasonableness, I respectfully direct the Court's

attention to the further language of *Chapter 501.09, Florida Statutes*, wherein the Florida legislature provides:

> "• • • If at any time during a fiscal year the revenue received by the Commission under this Chapter exceed by at least twenty-five per cent (25%) the total amount of expenditures as budgeted by the Commission for that fiscal year, the payment of taxes provided for • • • in 501.09(4), on milk distributed by distributors, will be discontinued • • • for the calendar months remaining in that fiscal year • • •."

We see that by legislative expression the gallonage fee or tax collected as to this Appellant is not calculated to be punitive nor productive of general revenue funds for general state purposes. It is clear that the funds are to be used solely for the purpose of inspecting and regulating this critical industry. *Corpus Juris Secundum, Vol. 15, page 58*, states:

> "As an incident to its power to make valid inspection laws, a state may charge a fee reasonably sufficient to meet the expenses of the inspection and such a fee *is not properly assailable as a burden on interstate commerce*." (Emphasis supplied)

As an authority for this comment, *U.S.—Pure Oil Co., vs. State of Minnesota, 63 Lawyers' Edition 180*, is cited. In *Texas Co. vs. Brown, 67 Lawyers' Edition, 721, 258 U.S. 466*, it was stated that the only manner in which such a regulatory fee may be subject to attack is that it is so excessive as to constitute, in effect, a tax for revenue purposes and therefore void as imposing a burden on interstate commerce. Exposing the gallonage tax of Florida to this rule, there certainly can be no reasonable logic to an argument that it is so excessive as to constitute a general revenue measure. Certainly here the sums collected can never reach the state's general revenue and the tax or fee abates when the inspection and regulation board is assured of

sufficient funds for that purpose. *NOTE* that none of these cases say that such a fee cannot *effect interstate commerce*. There is no validity to the contention that this constitutes a tax upon the U. S. Government for by the very language of the statute, it is a privilege license fee based upon a gallonage. A very similar situation is presented in *U.S. vs. Lee, 13 So 2d 919*, wherein the Florida Supreme Court held that a Florida six cent ($.06) gasoline tax was levied upon the privilege of selling gasoline and was not prohibited by the mere fact that a dealer occasionally sold gasoline to the United States Government. The tax here is clearly upon a regulated licensee and not upon the United States. The Attorney General of Florida has ruled, in *Opinion No. 056-43* in complete accord with the position taken in this brief and required thereby the collection of the regulatory fee from distributors, even though they sold to military installations. The Court will note that no evidence was submitted which even attempted to prove excessiveness of tax or diversion to other state purposes or to the general revenue fund of Florida. One of the best expressions upon the efficacy of this tax is found in *Baldwin vs. Seelig, 294 U. S. 511*, which is treated more fully at other points in this brief. The Court there said:

> "A tax upon merchandise brought in from another state or upon its sales whether in original packages or not, after it has reached its destination and is in a state of rest, *is lawful* only when the tax is not discriminatory in its incidence against the merchandise because of its origin in another state." (Emphasis supplied)

This should put to rest the tax contention of Appellant. By any standard or definition, it is a proper regulatory fee by a state upon a citizen and without discrimination as to sister states, citizens thereof or commerce between them.

CONCLUSION

Milk, our most important single food, has been subject to governmental regulation in this country for approximately a century. The necessity for the sanitary control of milk and dairy products, and the regulation of their quality, by appropriate administrative agencies is well established in American jurisprudence. All such reasonable regulation frequently has been upheld by the courts of last resort in this country.

Econonic control of the dairy industry by governmental regulation, including the power to fix prices, is of more recent development. It was initiated in 1933 and since that time has been sustained by the courts as a valid and constitutional exercise of the police power over an industry which is affected with a public interest.

At one time or another 29 States and the Federal Government have enacted legislation authorizing the regulation and control of this important industry. To use the language and logic of Judge Carswell in the opinion of the Court below (R-189):

> "It is the duty of the Court to sustain police measures unless it is clearly, plainly and palpably in violation of the Constitution. An earnest conflict of serious opinion does not suffice to bring such an act within the range of judicial cognizance. At best plaintiff's contentions are an earnest conflict of serious opinion, and the proof offered to sustain these contentions is quite insufficient to warrant the relief sought, and judgment is accordingly entered by appropriate order for the defendant."

The economic stability of the dairy industry as a whole and particularly that of the dairy farmer is precarious at best. The necessity of regulation to protect the substantial interest of the dairy farmer should not be viewed only in the light of seasonal surpluses from which distributors might at that moment

draw a supply of milk. Regular production units must be maintained in a relatively healthy position so that the end result might be a steady, wholesome supply of milk and milk products for this nation. This is done by state and federal regulation without which economic chaos would be the end result. To accomplish this regulation all areas of the industry, both production and distribution must pay reasonable regulatory fees, there being no testimony that any of such funds in Florida flow to the benefit of the general revenue fund, but are authorized exclusively by the regulatory body in the fulfillment of its function. Producers and distributors are treated alike and no testimony as to either excessiveness or singular application was submitted.

It is respectfully submitted therefore that the opinion and order of the lower court should be affirmed and the stability of this industry in Florida thereby guaranteed.

Respectfully submitted,

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PROOF OF SERVICE

I, MALLORY E. HORNE, one of the attorneys for the FLORIDA MILK COMMISSION, and CHARLES O. ANDREWS, JR., Et al, Appellees, and scheduled to become a member of the Bar of the Supreme Court of the United States prior to the argument hereof, hereby certify that on the _____day of September, 1963, I served a copy of the foregoing Brief, together with Appendices, on the several parties hereto by mailing a copy in a duly addressed envelope, air mail, postage prepaid, to their respective attorneys of record, as follows: JOE J. HARRELL, of Jones and Harrell, 201 East Government Street, Pensacola, Florida, and J. A. McCLAIN, JR., Suite 615, Marine Bank Building, Tampa, Florida, Attorneys for Polar Ice Cream and Creamery Company, Pensacola, Florida.

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